It is true that in such a case as the one under discussion the offense need not be proved to have been committed on the exact dates named in the indictment. The inquiry should be, therefore, whether the alleged fugitive was in the state at the actual time of the crime. But to presume in the absence of evidence that the indictment does not state the correct date, and that the crime was in fact committed on the different date when the alleged fugitive was in the state, would seem clearly unwarrantable. No evidence of this nature having been offered in the case in hand, it was proper to confine the inquiry to the dates stated.

THE DEFENSE OF CONTRIBUTORY NEGLIGENCE. — In the American Lawyer for January Mr. Paul Speake in an article entitled *Wantonness in Personal Injury Cases* discusses "wantonness" as defined and applied by the Alabama Courts. 12 Am. Lawyer 4. The difficulty of stating any concise definition of the term is clearly pointed out, and many cases in which the defendant has, or has not, been held guilty of wantonness are cited. The term "wantonness" characterizes that conduct of the defendant which enables the plaintiff to recover notwithstanding his contributory negligence even though the injury suffered by the plaintiff was not intended by the defendant. Mr. Speake limits his discussion to the state of the law in Alabama, but the article gives rise to the general question: What is the nature of the defense of contributory negligence, and to what class of cases ought it to apply? There is no such defense in cases where the defendant has intentionally damaged the plaintiff. *Steinmetz* v. *Kelly*, 72 Ind. 442. Here the defendant is held liable for the plaintiff's damage, even though the plaintiff's negligence aided the defendant to accomplish the injury he desired. The defense of contributory negligence is applicable to actions based on the defendant's negligence in cases where the plaintiff's negligence is wholly or partly the legal cause of the damage for which he is seeking to recover. The defense ought not to be said to apply to those cases where the plaintiff's own negligence intervenes and breaks the causal connection between defendant's breach of duty and the plaintiff's injury. The real defense in these cases is that the defendant's negligence is not the legal cause of the damage. However the term "contributory negligence" is frequently applied to these cases. POLLOCK, TORTS, 446, 447.

The real case of contributory negligence is one in which the plaintiff's injury is caused both by the negligence of the defendant and of the plaintiff, the negligence of neither breaking the causal connection between that of the other and the resulting damage. In such a case the plaintiff cannot recover, not because it can be said that the defendant's negligence is not the immediate cause of the injury, but because the plaintiff could have avoided the injury by the exercise of due care. In order to recover damages the plaintiff must show that at the time of the injury "by ordinary care he could not, and the defendant could, have prevented the injury." Carpenter, J., in *Nashua, etc., Co.* v. *Worcester, etc., R. R. Co.*, 62 N. H. 159. "The justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of care set by law." 3 HARV. L. REV. 270. If the breach of duty causing the damage for which the plaintiff seeks to recover is committed by the defendant with a consciousness that damage is likely to result, then, according to some definitions, the tort is not a negligent one. WHART. NEG. § 3. But according to others the tort is called negligent. SAUND. NEG., 1st ed., 1. The books and reports are hopelessly in conflict and not much is to be gained by a consideration of them. It is believed, however, that the defendant should not be denied the defense of contributory negligence unless he has actual knowledge of the danger to which he is unlawfully subjecting the plaintiff, and, having such knowledge and being indifferent as to the consequences, omits to use reasonable means to prevent the injury. It is not enough that the defendant ought to know of the damage. This view finds support in some of the decisions. *Ga. Pacific R. R. Co.* v. *Lee*, 92 Ala. 262.

The position of the defendant should be the moral equivalent of that of a wilful wrongdoer if the rule of policy denying relief to a negligent plaintiff is to become non-effective.

EFFECT UPON FORECLOSURE SALE OF THE DEATH OF MORTGAGOR BEFORE CONFIRMATION. A common statute provides that upon default of payment by the mortgagor, the mortgagee may file a petition or commence *scire facias* proceedings for foreclosing the equity of redemption. By the decree or judgment thereunder a new date is fixed on or before which the mortgagor may redeem, and at which, if the mortgagor has not redeemed. the realty will be sold by an officer of the court and the proceeds applied to the payment of the debt. In some states, where foreclosure is accomplished by the sale under *scire facias* proceedings, no confirmation is required. More commonly, however, confirmation is necessary. In case the mortgagor dies during these proceedings, the validity of the foreclosure has been recently questioned. *Effect upon a Foreclosure Sale of the Death of the Mortgagor before Confirmation*, by Edward M. Winston, 58 Central L. J. 103 (Feb. 5, 1904). Until the confirmation of the sale, it is contended, the mortgagor's interest continues. Since an estate will accordingly pass to the heir on the death of the mortgagor, Mr. Winston concludes that the foreclosure is invalid, unless the heir is made a party to the proceedings. The fact that a contrary rule has been generally adopted and the reason for its adoption are ignored by Mr. Winston.

The essential nature of foreclosure proceedings requires that the holder of the equity of redemption be a party to the decree. If before the decree is rendered, therefore, the mortgagor dies and proceedings are not revived against the heir, the decree and any sale thereunder are plainly void. *Hunt* v. *Acre*, 28 Ala. 580. If, however, the mortgagor dies after the decree is rendered, it has been held that reviver against his successor is not necessary to the validity of subsequent proceedings. *Hays* v. *Thomae*, 56 N. Y. 521; *Trenholm* v. *Wilson*, 13 S. C. 174. Support for this view is sought in the rule that a decree obtained in the lifetime of the defendant-party may be enrolled after his death. See *Harrison* v. *Simons*, 3 Edw. (N. Y.) 394, 395. This analogy between enrollment and the confirmation of a foreclosure sale, it is submitted, is fallacious. Enrollment is a non-discretionary and ministerial act. *Sheffield* v. *Duchess of Buckingham*, West 673. The confirmation of the foreclosure sale by the court, on the other hand, is the definitive act in the foreclosure proceedings. The foreclosure sale passes no title to the purchaser. *Woehler* v. *Endter*, 46 Wis. 301. Only upon the confirmation of the sale, which rests entirely within the discretion of the court, does title pass to the purchaser. *Brown* v. *Isbell*, 11 Ala. 1009. When the equity of redemption is finally foreclosed, the holder, it would seem, should be before the court. One jurisdiction has already held that, upon the death of the mortgagor before the foreclosure sale, reviver is necessary against his successor. *Glenn* v. *Clapp*, 11 G. & J. (Md.) 1. Upon principle it seems sound, as Mr. Winston contends, to make reviver of proceedings against the successor essential to the validity of the foreclosure, when the mortgagor dies at any time before the confirmation.

MALICIOUS TORTS. — The attempt is made in a suggestive and noteworthy article of recent date, remarkable for its keen analysis and its accuracy of expression, to separate and distinguish the different kinds of questions that may arise in a case of malicious tort. *Malicious Torts*, by Henry T. Terry, 20 L. Quart. Rev. 10 (Jan., 1904). The author begins with an elaborately wrought discrimination between the various kinds of rights and duties recognized in the law. To each legal right corresponds a particular kind of legal duty. When a breach of the corresponding duty results proximately in a violation of a right, a